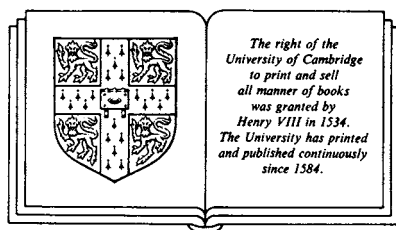

THE PROVINCE OF LEGISLATION DETERMINED

Legal theory in eighteenth-century Britain

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Introduction

The eighteenth century, according to the judgment of its current historians, was England's century of law. As E. P. Thompson has put it, "'The Law' [was] elevated during this century to a role more prominent than at any period" of English history.¹ The culture of law, it is increasingly observed, extended throughout the social fabric, conditioning popular protest as much as formal public debate. "From the hue-and-cry to the macabre carnival of the public hanging," notes Roy Porter, "the law and its execution were not just Government fiat or ruling-class weapons but an intimate part of community life."² Law and legal process were equally fundamental to the political dynamic of this community. "Most Englishmen experienced government and understood politics through their dealings with the law," John Brewer has argued. In this society, "all parties – government, radical and spectators ... recognized the potency of [the law's] symbols and rituals, knew how significant a platform its institutions provided and what a powerful legitimizing force its endorsement could be."³ Even Sir Lewis Namier was forced to conclude that, "in the eighteenth century, Parliamentary politics were transacted, to a disastrous extent, in terms of jurisprudence."⁴

These remarks echo those of contemporary observers who were also struck by the distinctiveness of England's fabric of legality. Montesquieu, in a celebrated and much repeated judgment, reported that England boasted the only constitutional order which had political "liberty" for its "direct end."⁵ Adam Smith maintained that in no

¹ E. P. Thompson, "Eighteenth-century English Society: Class Struggle Without Class?" *Social History*, III (1978), 144.

² Roy Porter, *English Society in the Eighteenth Century* (Harmondsworth, 1982), p. 150.

³ John Brewer, "The Wilkites and the Law, 1763–74," in John Brewer and John Styles (eds.), *An Ungovernable People. The English and Their Law in the Seventeenth and Eighteenth Centuries* (London, 1980), pp. 133, 135.

⁴ L. B. Namier, *The Structure of Politics at the Accession of George III*, 2 vols. (London, 1929), I, 54.

⁵ Charles Louis de Secondat, Baron de Montesquieu, *The Spirit of the Laws* (1748), trans. Thomas Nugent and introduction by Franz Neumann (New York, 1949), p. 151.

other nation had the rules of law achieved such "great exactness" in their execution.⁶ "Tis the great advantage and happiness of us of this Nation," explained Lord Chancellor Hardwicke, "to live under a Government...secured to us by the best body of Laws that human wisdom can frame."⁷

This book is concerned with that part of the legal experience of eighteenth-century England represented in the more formal and systematic contemporary reflection on the nature of law in general and the character of the English system of law in particular. In so considering legal theory, we address a subject that enjoyed a prestige nearly equal to that of the law itself. "The science of jurisprudence," observed Burke "[is] the pride of human intellect...the collected reason of ages, combining the principles of original justice with the infinite variety of human concerns."⁸ My first objective in examining this eminent eighteenth-century science is to recover an important contemporary discussion of the rival claims of common law and legislation within the English legal system, to suggest how this discussion illuminates more general and familiar themes in the political thought of the period, and especially to indicate the way in which questions regarding legal change and law reform came to be framed in terms of this discussion. To do so, I explore the legal literature in which the issue was explicitly raised as well as the contemporary developments in the law and society which were thought relevant to its consideration. The result is a study of eighteenth-century intellectual history which draws upon an unusually wide range of legal materials.

In many cases, such as the discussion of Blackstone's *Commentaries on the Laws of England* in part I, I am dealing, of course, with major and celebrated landmarks, as familiar to the historians of political and constitutional ideas as to historians of law. But, as I seek to show in highlighting the overlooked programmatic features of the *Commentaries*, Blackstone's famous production needs to be placed alongside the much less familiar work of legal antiquarians, such as Daines Barrington and Francis Hargrave, and of the authors of practical manuals of law, such as Richard Burn. The historical researches of Barrington, Hargrave and Burn (considered in part III) contain weighty statements of the common law approach to legal improvement, and this material is

⁶ Adam Smith, *Lectures on Jurisprudence*, ed. R. L. Meek, D. D. Raphael, and P. G. Stein (Oxford, 1978), p. 275.

⁷ British Library Additional Manuscript 36, 115. ff. 103 (a); cited in Clyde Elliott Croft, "Philip Yorke, First Earl of Hardwicke - An Assessment of his Legal Career," unpublished Ph.D. thesis, Cambridge University, 1982 p. 148 n346.

⁸ *Reflections on the Revolution in France* (1790), in *The Works of the Right Honorable Edmund Burke* (1865-7), 8th edn, 12 vols. (Boston, 1884), III, 357.

especially important for the recovery and elucidation of the neglected Baconian tradition of English legislative theory, which dominated Hanoverian discussion of statute reform. Indeed, as I suggest in treating the penal doctrines of William Eden and Samuel Romilly, this Baconian tradition also set the basic structure for the legislative programs of the eighteenth-century criminal law reformers, whose proposals are often incorrectly assessed in terms of later law reform conventions.

Although this book is not designed as a traditional work of legal history, part II draws heavily on eighteenth-century case law and discusses the judicial career of Lord Chief Justice Mansfield. The decisions of Mansfield's court greatly enrich our understanding of common law orthodoxy, particularly in regard to the place of natural jurisprudence in common law theory. The eighteenth-century perception of Mansfield's court as the instrument of dramatic legal improvement and as a recent exemplification of "the wisdom of the common law" serves to clarify the confidence with which common lawyers associated the challenge of legal modernization with the historic institutions of customary law. And in turning to the legal ideas of Lord Kames, I explore how the model of legal development identified in the recent and past achievements of the English courts furnished an important bridge between the legal speculation of Hanoverian England and the prestigious styles of historical jurisprudence and social philosophy developed during the same period in Scotland.

This broad survey of eighteenth-century legal development and legal thought, in turn, provides the background for another of this study's major objectives, which is to advance a new account of Jeremy Bentham's earliest explorations in jurisprudence. The examination (in part IV) of what Bentham's first legislative program owed to his engagement with the English discussion of common law and legislation is designed to supplement earlier scholarship which has properly directed attention to Bentham's debts to continental sources.⁹ However, in considering Bentham's relationship to contemporary developments in English legal thought, I also wish to establish a general historical theme: that Bentham's legislative science should be regarded not as the definitive ideology of law reform produced in eighteenth-century England, but rather as one among several approaches to legislation and legal improvement elaborated at this time. The recovery of these rival reform traditions would, I believe, revise our understanding of

⁹ See, as leading examples, Elie Halévy, *La Formation du Radicalisme Philosophique*, 3 vols. (Paris, 1901-4), and, more recently, L. J. Hume, *Bentham and Bureaucracy* (Cambridge, 1981).

Bentham's legacy and of the intellectual orientation of the Victorian law reform movement, though these implications are not pursued in this book. All I hope to show here is just how much history was lost in the nineteenth-century conviction, as voiced by Lord Brougham, that "the age of Law Reform and the age of Jeremy Bentham are one and the same...No one before him had ever seriously thought of exposing the defects in our English system of Jurisprudence."¹⁰

The central place of law and legal ideas in English political and social thought is scarcely a novel claim, and in the detailed interpretation of such figures as Blackstone and Bentham there is little danger of scholars neglecting the specifically legal dimensions of their thought. The importance of law and jurisprudence is in this way well established. But there has been no recent survey of the general development of legal theory in the age of Blackstone and Bentham.¹¹ Consequently, it is useful to begin this discussion by briefly relating its concerns to the available intellectual histories of eighteenth-century England.

For this purpose it is convenient to invoke two particularly powerful and influential interpretative syntheses. The first of these received classic exposition over a century ago in Leslie Stephen's twin-volume *History of English Thought in the Eighteenth Century*. This study set out historical background for the long-influential Victorian surveys (including Stephen's own later monument, the three-volume *The English Utilitarians*) which provided the first thorough assessments of the rise and influence of Benthamism.¹² For Stephen and his generation, English political thought in the eighteenth century revolved around the polar star of Locke's *Second Treatise of Government*. Locke's was "the formal apology of Whiggism" and "his writings became the political bible of the following century."¹³ The historical trajectory from Lockean Whiggism to reforming Benthamism was an uncomplicated, natural progression. Locke's contractarian political doctrines were themselves "almost identical with the utilitarian formula," and his ethical theory furnished the "primary impulse" for "the moralists

¹⁰ "Speech on the Present State of the Law" (1828), in *Speeches of Henry Lord Brougham ... with Historical Introductions*, 4 vols. (Edinburgh, 1838), II, 287.

¹¹ There is, for example, nothing for the eighteenth-century comparable to the general accounts of seventeenth-century legal theory presented in J. G. A. Pocock's *The Ancient Constitution and the Feudal Law* (Cambridge, 1957) or Richard Tuck's *Natural Rights Theories. Their Origin and Development* (Cambridge, 1979).

¹² See Stephen's *The English Utilitarians*, 3 vols. (London, 1900); Halévy, *La Formation du Radicalisme Philosophique*; and A. V. Dicey, *Lectures on the Relation between Law and Public Opinion in the Nineteenth Century* (London, 1905).

¹³ Leslie Stephen, *History of English Thought in the Eighteenth Century* (1876), 2 vols. (London, 1962), II, 114.

who, in later phraseology, have been called utilitarians."¹⁴ At mid-century Hume "stated" the "essential doctrines of utilitarianism" with unique "clearness and consistency," and "from Hume to John Stuart Mill, the doctrine received no substantial alteration."¹⁵ The "dominant school of the century" comprised the theological utilitarianism of William Paley and his fellow Anglican divines.¹⁶ Bentham's own utilitarian theory merely constituted "Paley *minus* the belief in hell-fire." His distinctive intellectual achievement was to transfer "the doctrine of utility from the sphere of speculation to that of immediate legislation."¹⁷

To sustain the primacy in eighteenth-century speculation of "the purely English or utilitarian school of which Bentham became in later years the accepted prophet,"¹⁸ Stephen introduced a variety of interpretative devices. Certain major intellectual developments were fully acknowledged but accommodated outside this central theme. Adam Smith, whose *Wealth of Nations* was outranked in importance by no other book "published in Great Britain during the last half of the eighteenth century," was placed in a separate chapter on "political economy," equipped with its own historical origins and development.¹⁹ Edmund Burke – "incomparably the greatest man who has ever given the whole force of his intellect to the investigation of political philosophy in England" – was granted an exalted but isolated achievement in proclaiming a doctrine antithetic to "all the contemporary political speculation," namely "the conception of a nation as a living organism of complex structure and historical continuity."²⁰ Other, non-utilitarian political speculation was dismissed for not being theoretical enough. Accordingly, the "mass of pamphlets and speeches" which recorded the Augustan preoccupation with "liberty, corruption and luxury," the Whig obsession with "the Pretender," and the endless parliamentary distraction with "the Excise and the Hanoverian subsidies" was judged to lack "even a show of political philosophy." "Notwithstanding the incessant "jargon about standing armies and annual parliaments," the "first half of the eighteenth century had... produced no English book upon the theory of politics capable of communicating any great impulse to speculation."²¹

If the central trajectory of English eighteenth-century social thought thus connected the Lockean exposition of "the principles of the Revolution of 1688" to the Benthamic legislative science "to reform

¹⁴ *Ibid.*, II, 115, 68.

¹⁵ *Ibid.*, II, 73.

¹⁶ *Ibid.*, II, 89, 103.

¹⁷ *Ibid.*, II, 106. See also Stephen, *English Utilitarians*, I, 235–6, 288–9.

¹⁸ Stephen, *English Thought in the Eighteenth Century*, II, 174.

¹⁹ *Ibid.*, II, 269.

²⁰ *Ibid.*, II, 195.

²¹ *Ibid.*, II, 111, 157–8.

society anew,"²² the resulting historical question for Stephen was the century-long hiatus before utilitarianism emerged as a programmatic, reforming ethic. This delay was readily explained in terms of the prolonged "period of political stagnation" which followed the "accession of George I," a time when the "governing classes enjoyed the power they had acquired by the Revolution," when "not one constitutional question of the least importance arose," when "the nation indolently drifted towards an unknown future," and when in result "Englishmen rather played with political theories than seriously discussed them."²³

Stephen's image of social thought in eighteenth-century England thus contained one serious theory, utilitarianism, which slumbered through the long period of political conservatism, stagnation and empty political rhetoric until it was awakened in service of a comprehensive reform program by Bentham.²⁴ This was a picture much favored by Bentham himself, and the accompanying emphasis on what Ernest Barker described as the "complacent development of the eighteenth century" became a standard theme of such histories, particularly those attending to law and legal theory.²⁵ Maitland wrote that "a time of self-complacency came for the law, which knew itself to be the perfection of reason."²⁶ James Bryce likewise remarked on the "genial optimism" of the age which "took the law as it stood to be the best possible," an attitude that received authoritative expression in the writings of Bentham's great adversary, William Blackstone, who found "little to criticize and nothing to require amendment in rules and a procedure which half a century later few ventured to justify."²⁷

The limitations of Stephen's reading of eighteenth-century intellectual history easily appear when confronted by a second influential interpretative framework of more recent coinage. This second reading can be termed (as has been done in a related context) the "republican synthesis."²⁸ Although this synthesis is the product of many separate and substantial contributions, for our purposes here it can be best explored through the work of J. G. A. Pocock who has

²² *Ibid.*, II, 114, 215.

²³ *Ibid.*, II, 141, 111.

²⁴ *Ibid.*, II, 106.

²⁵ Ernest Baker, *Traditions of Civility* (Cambridge, 1948), p. 284.

²⁶ F. W. Maitland, "History of English Law" (1902), *Selected Historical Essays*, ed. Helen M. Cam (Cambridge, 1957), p. 113.

²⁷ James Bryce, *Studies in History and Jurisprudence*, 2 vols. (Oxford, 1901), II, 615. In more recent scholarship, something like this image of the period survives in the work of Namier and his school. For characteristic statements, see Namier, *Structure of Politics*, I, 21, and Richard Pares, *King George III and the Politicians* (Oxford, 1953), pp. 2-3.

²⁸ So termed by Robert E. Shalhope in his "Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography," *William and Mary Quarterly*, XXIX (1972), 49-80.

done most to chart and elaborate the classical republican (or, in his preferred usage, "civic humanist") themes of early-modern social thought.²⁹

On Pocock's reading, early-modern republican ideology centered on a deeply moralized ideal of citizenship, conceived as the active exercise of civic virtue and participation in the common good which alone enabled the individual to achieve his full moral capacity and the community to maintain republican self-government. Civic virtue and republican association were ever vulnerable to the mortal diseases of corruption and self-interest, and the inevitable conflict between virtue and corruption featured as the organizing category of the republican perception of political life. In eighteenth-century England, following upon the seventeenth-century constitutional struggles and the Harringtonian tendency to identify the patriotic citizen with propertied independence, republicanism involved an intense preoccupation with the preservation of constitutional balance and parliamentary independence along with a no less intense disquiet over the perceived corrupting impact of commercial prosperity. In the polemics of the Walpolean era and in the arguments against imperial policy in the American colonies, for example, such concerns informed and structured the standard criticisms of Whig leadership and the mechanisms of Whig political management: its parliamentary system of an enlarged Executive, placemen and the Septennial Act; its financial system of public credit, excise and National Debt; and its military system of standing armies and swollen navies. "From 1688 to 1776 (or after)," Pocock observes, "the central question in Anglophone political theory was not whether a ruler might be resisted for misconduct, but whether a regime founded on patronage, public debt, and professionalization of the armed forces did not corrupt both governors and governed; and corruption was a problem in virtue."³⁰

Pocock has been especially articulate in disclosing the ways in which the recovery of this "civic humanist mode of discoursing about politics"³¹ has transformed our general understanding of English

²⁹ The first version of Pocock's interpretation is contained in chapters 3 and 4 of J. G. A. Pocock, *Politics, Language and Time. Essays on Political Thought and History* (London, 1972), though the thesis received fullest elaboration in *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, 1975). Many of his most recent contributions are collected in *Virtue, Commerce, and History. Essays on Political Thought and History, Chiefly in the Eighteenth Century* (Cambridge, 1985). For the larger body of scholarship of which Pocock's work forms a part, see the bibliographic surveys supplied by Shalhope in "Toward a Republican Synthesis" and "Republicanism and Early American Historiography," *William and Mary Quarterly*, XXXIX (1982), 334–56, and by Pocock in "The Varieties of Whiggism from Exclusion to Reform," in *Virtue, Commerce, and History*, pp. 215–310.

³⁰ "Virtues, Rights and Manners. A Model for Historians of Political Thought," *Virtue, Commerce, and History*, p. 48.

³¹ *Ibid.*, p. 39.

thought in the eighteenth century. Among the most spectacular victims of the interpretation is "the myth of Locke" and the attendant "obsession with liberalism."³² Instead of Locke serving, as in Stephen's account, as the period's scriptural authority, he becomes conspicuous for his "indifference to the paradigm of virtue" and plays "no predominant role" in the formulation of the "Whig canon" of republican authorities.³³ Equally, the periodization of political debate is revised. The familiar landmark of the Revolution of 1688 slips from prominence, and the so-called Financial Revolution – "the development of the Bank of England and the National Debt" – emerges as "the turning-point in the history of English and Scottish political ideology."³⁴ Finally, what Stephen confidently dismissed as those "most transparent of artifices" – the commonplace "generalities about liberty, corruption and luxury" and the standard "jargon about standing armies and annual parliaments"³⁵ – are revealed to be the hallmarks of a coherent and well-entrenched theory of politics constructed upon "the civic ideal in its expressly republican form."³⁶

The republican synthesis has not served simply to recover large areas of eighteenth-century political debate discounted by earlier generations. The renaissance and seventeenth-century routes to eighteenth-century orthodoxies have been illuminated, and in Pocock's most recent studies, the themes of Anglophone republicanism have been projected suggestively into the first decades of the nineteenth century.³⁷ Nor has the interpretation been confined to the exposition of "Anglophone political theory" narrowly conceived. The same civic ideal and the widely ramifying contemporary reflection upon it furnish "a major key to eighteenth-century social thought," supply the "most fundamental problem" of the period's "moral philosophy," and inform "nearly all eighteenth-century philosophy of history."³⁸ Yet, at the

³² J. G. A. Pocock, "The Myth of Locke and the Obsession with Liberalism," in J. G. A. Pocock and Richard Ashcraft, *John Locke: Papers Read at the Clark Library Seminar* (Los Angeles, 1980), and "Authority and Property: The Question of Liberal Origins," in *Virtue, Commerce, and History*, pp. 51–71.

³³ Pocock, "The Myth of Locke," p. 18, and "Authority and Property," p. 66.

³⁴ J. G. A. Pocock, "The Machiavellian Moment Revisited: A Study in History and Ideology," *Journal of Modern History*, LIII (1981), 64–5.

³⁵ Stephen, *English Thought in the Eighteenth Century*, II, 157–8, 111.

³⁶ J. G. A. Pocock, "Cambridge Paradigms and Scotch Philosophers," in Istvan Hont and Michael Ignatieff (eds.), *Wealth and Virtue. The Shaping of Political Economy in the Scottish Enlightenment* (Cambridge, 1983), p. 245.

³⁷ "The Varieties of Whiggism from Exclusion to Reform," in *Virtue, Commerce, and History*, pp. 215–310.

³⁸ "The Mobility of Property and the Rise of Eighteenth-Century Sociology," p. 115, "1776: The Revolution against Parliament," p. 78, "Varieties of Whiggism," p. 231, *Virtue, Commerce, and History* (and see generally chapters 10 and 11).

same time that the recovery of "the paradigm of virtue and corruption"³⁹ has accommodated and clarified such a range of speculation, the republican synthesis falls silent in the face of what to earlier scholars seemed among the eighteenth century's most significant and characteristic intellectual episodes. "Bentham concealed his origins if he had any," Pocock reports, and the "parameters within which occurred the mutation of discourse that produced him and his mind are hard to establish and seem not to belong to the history of English public debate."⁴⁰

This study seeks to establish just such a context within the history of English public debate for Bentham and Benthamic legislative science, and to the extent that this aim presumes the importance of the historical development it scrutinizes, the treatment recalls the concerns of Stephen's history. Where it departs decisively from his account is in rejecting Stephen's picture of the historical background to Bentham as a period of ideological consensus and untroubled political complacency. Here the discussion shows its major debt to Pocock's scholarship, and to those social and political historians who have so qualified and revised previous characterizations of Hanoverian England as a nation, in Namier's words, "at one in all fundamental matters."⁴¹ Yet even though the "republican synthesis" informs much of the initial orientation of the investigation, it makes only a limited impact on its detailed findings. This too deserves comment.

The failure of "the paradigm of virtue and corruption" to accommodate the emergence of Benthamic legislative science need not be taken as a direct challenge to the republican synthesis itself. As Pocock always has been careful to stress, his chronicle of civic humanism "was a 'tunnel history'" which "pursued a single theme, that of the *vivere civile* and its virtue, to the partial exclusion of parallel phenomena."⁴² Among the "parallel phenomena" avowedly excluded was the "philosophic and juristic" mode of "discoursing about politics," termed by Pocock the "law-centered paradigm" and associated, in turn, with scholasticism, civil and natural jurisprudence,

³⁹ "Virtues, Rights and Manners," p. 48.

⁴⁰ "Varieties of Whiggism," p. 277. See also "The Mobility of Property and the Rise of Eighteenth-Century Sociology," p. 123, and *Machiavellian Moment*, p. 547.

⁴¹ Namier, *Structure of Politics*, I, 21. The critics are numerous, but I have learned especially from E. P. Thompson, "Patrician Society, Plebeian Culture," *Journal of Social History*, VII (1974), 382-405, and "Eighteenth-century English Society: Class Struggle Without Class?," and from John Brewer, *Party Ideology and Popular Politics at the Accession of George III* (Cambridge, 1976).

⁴² Pocock, "Machiavellian Moment Revisited," p. 53. See also "Cambridge Paradigms," pp. 245-6.

possessive individualism and liberalism.⁴³ The two traditions, while contemporaneous, “are markedly discontinuous with one another because they premise different values, encounter different problems, and employ different strategies of speech and argument.”⁴⁴ Any study, such as this one, addressed to the specifically legal theory of eighteenth-century Britain would naturally fall on the juristic side of the division. Should this chosen concentration on “styles of thought based on jurisprudence” be taken to imply an argument “for neglecting, or reducing the importance of, styles based upon republican rhetoric”?⁴⁵

That this question needs investigating at all is a consequence of current debate over two major arenas of eighteenth-century intellectual history – the Enlightenment in Scotland and republicanism in America. In both cases, an impressive body of interpretation emphasizing classical republican strains has now been challenged by studies stressing the centrality of alternative intellectual frameworks: in the case of Scotland, the natural jurisprudence tradition of Grotius and his successors; in the case of America, the liberal rights theory of Locke and his successors.⁴⁶ Given the juristic foundations of these rival frameworks, Pocock has described the challenge (in the context of Scotland) as “an attempt to restore the history of political thought in general to the high road so long marked out by philosophy and jurisprudence.”⁴⁷ The result has been a contest over what Donald Winch has termed “alternative interpretative routes” which seems likely to dominate the next phase of research, notwithstanding the several contributors who have urged “a reconciling of the two positions.”⁴⁸

As all the contributors to this debate have recognized, the recovery of the historical context for any text must include reference to the work’s intellectual context, and this in turn has prompted the effort to situate the text in its appropriate framework of method, orientation,

⁴³ See “Machiavellian Moment Revisited,” “Cambridge Paradigms,” and especially “Virtues, Rights and Manners,” *Virtue, Commerce, and History*, pp. 37–48.

⁴⁴ “Virtues, Rights and Manners,” p. 39.

⁴⁵ “Machiavellian Moment Revisited,” pp. 53–4.

⁴⁶ For the relevant literature concerning Scotland, see the material cited by Pocock in “Cambridge Paradigms,” p. 248 n31; the essays by Hont and Ignatieff, by Moore and Silverthorne, and by Winch in *Wealth and Virtue*; and the essays by Forbes and by Haakonssen in R. H. Campbell and Andrew S. Skinner (eds.), *The Origins and Nature of the Scottish Enlightenment* (Edinburgh, 1982). For the literature on America, see Shalhope’s articles, “Toward a Republican Synthesis” and “Republicanism and Early American Historiography,” and the contributions discussed in the exchange between Banning and Appleby, in *William and Mary Quarterly*, XLIII (1986), 3–34.

⁴⁷ “Cambridge Paradigms,” p. 248 (on Scotland). For the American material, see his discussion in “Varieties of Whiggism,” pp. 253–74.

⁴⁸ Donald Winch, “Adam Smith’s ‘enduring particular end,’” *Wealth and Virtue*, p. 263. See also Pocock, “Cambridge Paradigms,” p. 248, and Banning, “Jefferson Ideology Revisited: Liberal and Classical Ideas in the New American Republic,” *William and Mary Quarterly*, XLIII (1986), 3–19.

style of argument and doctrinal presuppositions. (For our purposes here, we need not delay over the important issue of whether such frameworks should be construed as intellectual traditions, languages, modes of discourse or paradigms.) At the same time, though, certain dangers are already made apparent in concentrating eighteenth-century intellectual history on the essentially classificatory exercise of determining whether a particular work, or doctrine or theorist is discoursing in "the vocabulary or language of civic humanism" or "that of civil jurisprudence."⁴⁹ The enterprise tends to depict the "languages" in question as remarkably autonomous and isolated, a characterization which seems dubious given the very absence of agreement over which language best accommodates particular texts or figures.⁵⁰ Here distinctions and classifications which perhaps best serve purely heuristic purposes seem to be distorted on account of their being called upon to do simply too much service. Moreover, by focusing in this fashion on the rivalry between "alternative interpretative routes," opportunities for synthesis and advance seem to be lost in the attempt to maintain the hegemony of any single favored approach. Isaac Kramnick, for example, in his writings on late eighteenth-century political thought has sought to combat the republican thesis by identifying the presence of other, largely Lockean ideological sources. Yet, having so displaced republicanism, in his characterization of the Lockean alternative he seems content to ignore the insights achieved by the scholarship on republicanism and instead to return unrepentantly to earlier mappings of the intellectual terrain.⁵¹ Perhaps most damaging overall, our agreement to differ over the choice between "alternative interpretative routes" fails to raise fundamental questions as to whether the alternative traditions and vocabularies have been properly identified in the first place, whether, in fact, they have constituted "outstandingly discontinuous" styles of political theory, whether the relationship between the traditions has remained constant across periods and politics, and whether these materials are best excavated by way of "tunnel histories."⁵² The outcome is to make the study of the eighteenth

⁴⁹ Pocock, "Cambridge Paradigms," p. 248.

⁵⁰ See Winch's characteristically telling observations in "Adam Smith's 'enduring particular end'," pp. 263-4.

⁵¹ See Isaac Kramnick, "Religion and Radicalism: English Political Theory in the Age of Revolution," *Political Theory*, V (1977), 505-34, and "Republican Revisionism Revisited," *American Historical Review*, LXXXVII (1982), 629-66. In the second article in particular Kramnick's argument for a break in English political argument at 1760 seems simply to disregard the intervening work on the Tory, Dissenter and Wilkite traditions of protest by Linda Colley, *In Defiance of Oligarchy: The Tory Party, 1714-60* (Cambridge, 1982), and "Eighteenth-Century English Radicalism before Wilkes," *Transactions of the Royal Historical Society*, 5th series, XXXI (1981), 1-19, and by John Brewer in "English Radicalism in the Age of George III," in J. G. A. Pocock (ed.), *The British Revolutions: 1641, 1688, 1776* (Princeton, 1980).

⁵² I here utilize Pocock's terminology, (see the discussion above at n42 and n44).

century unhelpfully dependent on the discussion of earlier periods. For while it is abundantly clear that our present understanding of eighteenth-century ideologies has been enormously advanced by the recovery of what was received from the seventeenth century and before, it hardly follows that we must confine our analysis of eighteenth-century thought to those anyway contentious categories which have proved useful for the study of earlier periods. The stage has been reached when it makes sense to look for an alternative to the present alternatives.

The option pursued here is to examine legal ideas not with the aim of establishing the primacy of jurisprudence as an approach to eighteenth-century social thought, but in order dramatically to enlarge the issues and sources through which this thought is considered and characterized. The nature and potential advantages of this shift can be disclosed by returning to a judgment by Pocock cited above. In maintaining the centrality of republican ideology through the period "from 1688 to 1776 (or after)," Pocock notes that "the central question in Anglophone political theory" did not concern the grounds of resistance but "whether a regime founded on patronage, public debt, and professionalization of the armed forces did not corrupt both governors and governed," and that this ensured that "political thought" moved "out of the law-centered paradigm" of rights theory and into the republican "paradigm of virtue and corruption."⁵³ This may well be an entirely correct evaluation of the relative unimportance of resistance theory compared with republicanism in these years. Still, however this specific question should be settled, its solution ought not to prevent us from considering the wisdom of surveying the period's political thought in terms of these two rhetorically juxtaposed issues. The formula inevitably excludes from view the variety of contemporary concerns and responses to eighteenth-century parliamentary government which centered *neither* on questions of legitimate resistance *nor* on the corrupting impact of Whig political management.

It is precisely with one such range of response to eighteenth-century political life that this study is concerned: the reaction to the emergence of parliament as an active law-making institution. From the standpoint of either the "law-centered paradigm" or the "paradigm of virtue and corruption," the issues raised by parliament's legislative practice may appear as second-order questions. Nonetheless, it was these issues which provided the stimulus for more general reflection on the nature of England's legal inheritance, the challenges to the nation's institutions

⁵³ *Virtue, Commerce, and History*, p. 48. This claim has in turn been challenged by the counter-demonstration of the importance of Lockean resistance theory in the period after 1760; see Kramnick, "Republican Revisionism Revisited."